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Supreme Court of the United States

OCTOBER TERM, 1957

No. 782

SOUTH CAROLINA PUBLIC SERVICE COMMISSION,
PETITIONER,

versus

FEDERAL POWER COMMISSION AND GEORGIA PUBLIC SERVICE COMMISSION, RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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The Petitioner prays that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled case on October 23, 1957.

CITATION TO OPINIONS BELOW

The Opinion and Order of the Federal Power Commission, issued October 2, 1956, is reported at 16 F. P. C. 52. The opinion of the Court of Appeals for the Fourth Circuit of October 23, 1957, is reported in 249 F. (2d) 755

and is printed as an Appendix to the Petition in No. 697.[1] The Order of the Court of Appeals denying petitions for rehearing was entered on November 30, 1957.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on October 23, 1957. Rehearing was denied on November 23, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTION PRESENTED

Where two unaffiliated electric utilities, after arms' length bargaining, enter into a mutually advantageous 25 year contract for the purchase and sale of 75,000 KW, under which the buying utility obtains electrical energy at a cost of approximately $600,000.00 per year less than it could obtain the energy from other sources, and where the regulating agency in the state where the seller operates has approved the financing of the generating plant and the contract in issue, may the Federal Power Commission set aside the contract solely because its rates, reviewed in the light of the Commission's cost to serve formula, yield to the seller more than a fair return on its net investments?

STATUTE INVOLVED

The Statutes involved are Sections 205 and 206 of the Federal Power Act (16 U. S. C. A. 824(d), 824(e).

STATEMENT

In planning its program for additional generating facilities to meet increasing post war demands, the South

[1] A Petition for Certiorari to review the same judgment of the Court of Appeals for the Fourth Circuit has been filed by the South Carolina Generating Company in the United States Supreme Court (No. 697). References herein are to the Record and Appendix filed with that Petition.

Carolina Electric and Gas Company (Electric and Gas) [2] was confronted in 1950 with the necessity of providing electrical energy for the Atomic Energy Commission's H-Bomb site being constructed for it by du Pont in that portion of South Carolina served by Electric and Gas.

In negotiating terms it soon became apparent that du Pont would not accept rates based on conventional financing (not over 60% debt) of a new generating plant. Since the indenture provisions of bonds then outstanding did not permit Electric and Gas to finance with a debt ratio in excess of 65%, Electric and Gas decided to organize a wholly owned subsidiary, South Carolina Generating Company, to finance, build, and operate the new facility to be located in South Carolina on the Savannah River near Augusta. At a later date this became known as the Urquhart Station.

Since Electric and Gas operated only in South Carolina, this Petitioner was charged with the regulatory supervision of this utility, including the utility's financing. (§ 24-1 *et seq.* South Carolina Code of 1952.) Therefore Electric and Gas brought to the South Carolina Public Service Commission for approval a proposal authorizing it to carry out the said plans, and specifically authorizing it (1) to have the Generating Company build the Urquhart Station with two 75,000 KW steam generating units; (2) to sell to du Pont for the use of A. E. C. 30,000 KW of the output; (3) to finance this construction by the sale of bonds for 75 per cent. of the cost, notes for 15 per cent. of the cost, and common stock to the parent for 10 per cent. of the cost; and (4) to sell to Georgia Power Company 75,000 KW over a twenty-five-year period under the terms and conditions in the contract in issue here.

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[2] The South Carolina Electric and Gas Company serves the eastern and southern parts of South Carolina with electrical energy.

After fully considering all facets of these proposals, the South Carolina Commission approved the plan. (II 202-208.) Generating Company was organized, the Urquhart plant was built, financing was accomplished, and the contracts with du Pont and Georgia Power were duly executed and delivered, all in accordance with the orders of the South Carolina Public Service Commission.

THE GEORGIA POWER CONTRACT

The Georgia Power Company operates only in the State of Georgia. Like Electric and Gas, it has generating, transmission and distribution facilities. It is more than twice as large as Electric and Gas. There is no corporate or financial connection between the two.

In 1950, when Electric and Gas began planning its Urquhart plant to serve du Pont and its other customers, Georgia Power was in need of additional generation in the Augusta, Georgia, area to serve its increasing demands. Learning of Electric and Gas' plans to serve du Pont, it approached Electric and Gas to obtain a part of this energy. All of the negotiations between Georgia Power and Electric and Gas were at arms' length. Each party had the benefit of competent advice. The rate finally reached was in two parts. The energy component based on the cost of fuel and other operating costs are not at issue here.

In reaching an agreement on the capacity component, the parties made a comparison between the cost of generating 75,000 KW at Urquhart and the cost to Georgia Power of obtaining the same capacity from a plant built by it or from any other source. It was found that under the contract rate the Georgia Power Company would obtain this capacity for $600,000.00 less than it could from any other source. The cost of generating at Urquhart was substantially less primarily because of its high debt financing of 90%. Equity

money is much more expensive to an electrical utility than is debt money. In this case the F. P. C. puts the cost of equity at 10.50%, debt at 3.46% (I, 108). In addition to this difference in money cost, interest on debt, in calculating net operating income for a utility, comes ahead of Federal income taxes; so that the Generating Company could properly sell power to the Georgia Power Company for less than the said Company itself could produce such power.

PROCEEDINGS BEFORE THE FEDERAL POWER COMMISSION

The Federal Power Commission, after various conferences, initiated an investigation of the contract rate in October, 1954. A hearing resulted, and on March 1, 1956, the Examiner issued his report upholding the contract rate and dismissing the proceeding. The Commission, disregarding *in toto* the findings and the tentative opinion of its examiner, ordered the rate to the Georgia Power Company reduced by $252,186.00 annually (I, 116). Added to the admitted annual savings of $600,000.00, the effect of this order is to give Georgia Power Company, and therefore to its customers, the use of 75,000 KW at $852,000.00 below what said Company could obtain this power elsewhere.

THE COURT OF APPEALS

The Court of Appeals refused to apply the doctrine of *Federal Power Commission v. Sierra*, 350 U. S. 348, holding that this decision applied only when the rates of the selling utility were **too low**, not when **too high**. However, a majority of the Court was dissatisfied with the Commission's treatment of Federal income taxes and other items and remanded the case for a better explanation of the Commission's actions in these particulars.

REASONS FOR GRANTING THE WRIT

The regulation of the electric service of the Electric and Gas Company is primarily the responsibility of the South Carolina Public Service Commission. The Georgia Power contract at issue here is the only part of the business of Electric and Gas which is subject to Federal Power Commission review.

When Electric and Gas presented to the S. C. Commission its request for the approval of the creation of this subsidiary, with its high debt financing, that Commission withheld its approval of the plan until a contract was submitted showing an equitable plan for sharing the savings to be effected by the high debt financing. App. II, pp. 199-201; see also pp. 164-165.)

This contract between Georgia Power and South Carolina Generating Company was approved by the S. C. Commission because it was mutually beneficial (I, 87), and was an arms' length bargain. Without this approval by the South Carolina Commission, this arrangement could not have been made. Because of this mutual benefit, the South Carolina Commission takes the position that it is consistent with the public interest for Georgia consumers to receive $600,000.00 of annual benefits. Now the Federal Power Commission orders an additional $250,000.00 of benefits each year to the Georgia consumers. Since an electrical utility has no revenue other than its customers and since Electric and Gas operates only in South Carolina, it is obvious that, in order to give the Generating Company and Electric and Gas a fair return upon its investment, this $250,000.00 rate reduction to Georgia customers will come from South Carolina customers of Electric and Gas.

In the *Sierra case* this Court held that where two utilities, bargaining at arms' length, negotiate a long term wholesale contract, the rates and charges therein could not

be increased by the Federal Power Commission merely because the contract yielded **less** than a fair return on its net investment. Said the Court, in giving its reasons for its decision:

> "In such circumstances the **sole** concern of the Commission would seem to be whether the rate is so low as **to adversely** affect the public interest—as where it might impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory." 350 U. S. 355.

The Fourth Circuit refused to follow the reasoning of this case because it thought *Sierra* had no applicability to a situation where the rates yielded to the selling utility **more** than a fair return on its net investment. (App. 11.)

We submit that such a limitation on Sierra is not justified. The responsibility of the Federal Power Commission under Sections 205 and 206 is to review rates which are unreasonably high or unreasonably low. The statute makes no distinction.

The Federal Power Commission has no power to fix rates. (*United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U. S. 332 (1956).) Under the *Sierra case*, that Commission's power to modify rates agreed upon between two utilities as a result of arms' length bargaining is limited to cases where the rates so agreed upon are such as to adversely affect the public interest by impairing the ability of the utility to continue its service or to cast upon other consumers an excessive burden. In the case at bar both Georgia Power and South Carolina Electric and Gas are engaged in generation, transmission and distribution of energy. Any contract between the two whereby one sells and one buys primarily affects, in reality, only consumers. That is so because all electrical utilities of this type necessarily obtain all their revenues from consumers. Therefore,

the review powers of F. P. C. are for the protection of the customers of the seller as well as the customers of the buyer.

When the Federal Power Commission saw from the undisputed testimony (II, 165; I, 89) that the consumers of Georgia Power were receiving an annual benefit from the contract of $600,000.00, its review function was at an end. *Federal Power Commission v. Sierra, supra.* All other regulation was for the State Commission.

It is submitted that the necessary and useful power of the Federal Power Commission to modify in the public interest contracts between public utilities operating in different states is, in justice, in reason, and by authority, limited to cases where it can be shown that such contracts, especially where negotiated between utilities at arms' length, impair the ability of the utilities to serve the public. Hence, the Order of the Federal Power Commission in the case at bar should be reversed.

Respectfully submitted,

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